IN THE

Supreme Court of the United States

October Term 1975
No. 75-1226

HYMAN C. SLEPICOFF, dba Graduate Enterprises,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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The petitioner Hyman C. Slepicoff, dba Graduate Enterprises, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 19, 1975.

Opinion Below.

The opinion of the Court of Appeals is reported in 524 F.2d 1244 and appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 19, 1975. A due and timely Petition for Rehearing and Suggestion for

Rehearing En Banc was filed by petitioner and denied by the Court of Appeals on January 29, 1976. A copy of the letter from the Clerk of the Court of Appeals advising petitioner of the said order appears as Appendix B hereto. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the prosecutor, contrary to law and the decisions of the Supreme Court, wrongfully advised, directed and instructed the grand jury that the governing standards and tests for judging the obscenity of the material and probable guilt of petitioner under the federal obscenity statute were the standards enunciated by this Court in *Miller v. California,* 413 U.S. 15, when the concededly correct standards to be applied to petitioner's conduct, which occurred prior to *Miller* as alleged in the indictment, were the standards enunciated in *Roth-Memoirs,* all contrary to the grand jury and due process provisions of the Fifth Amendment, the fair trial provisions of the Sixth Amendment, and the ex post facto provisions of the Constitution.

2. Whether the judgment of conviction in the case herein, governed by the *Roth-Memoirs* standards, deprived petitioner of his liberty without due process of law, contrary to the provisions of the Fifth Amendment, when the government's sole witness, as well as the expert witnesses for petitioner, all agreed that the material was not utterly without social value, and where the only ground for denying a judgment of acquittal was the fact that the jury was free to disregard all the expert testimony, including testimony of the expert witness offered by the government.

3. Whether, contrary to the due process and fair notice provisions of the Fifth and Sixth Amendments, an instruction to the jury that material can be measured solely by its appeal to the prurient interest of sexually deviant groups renders the judgment of conviction unconstitutional, null and void, when neither the indictment nor the proof adduced at the trial charged or established that the petitioner intentionally designed or disseminated the material to a clearly defined sexually deviant group, rather than to the public at large.

4. Whether, in the light of instructions to the jury that the material here involved was to be measured not only by the standards of the local community, but by the standards of the entire State of Florida as well, the petitioner was arbitrarily deprived of rights guaranteed to him by the due process and fair trial provisions of the Fifth and Sixth Amendments by the refusal of the trial court to instruct the jury that at the time the material was mailed to the judicial district in Florida, the Florida obscenity statute had been declared unconstitutional by a three-judge federal district court and enjoined state officials from enforcing the law.

5. Whether, contrary to the due process provisions of the Fifth Amendment, the petitioner was wrongfully deprived of the opportunity to offer relevant and competent evidence on the issues of petitioner's good faith, absence of unlawful intent, and innocent conduct.

6. Whether the provisions of 18 U.S.C. §1461, on their face and as construed and applied to the advertisements and to petitioner's pre-*Miller* conduct, violate the free speech and press and due process provisions of the First and Fifth Amendments.

7. Whether 18 U.S.C. §1461, as construed and applied to petitioner, authorizes unrestrained and unlimited forum-picking by government officials and multivenue prosecutions under unascertainable standards, contrary to the free speech and press, due process, and fair trial provisions of the First and Fifth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments; of Title 18 U.S.C. §§1461, 1735 and 1737; and of Title 39 U.S.C. §§3010 and 3011 appear as Appendix C hereto.

Statement.

1. A nine-count indictment was returned on July 18, 1974, in the United States District Court for the Middle District of Florida, Orlando Division, charging petitioner with violations of 18 U.S.C. §1461 (A. 1-5).[1] After trial, with respect to Counts Three, Six, Eight and Nine of the indictment (films and advertisements), a jury returned verdicts of not guilty. Guilty verdicts were returned only with respect to Counts One, Two, Four and Seven. Count Five was dismissed during the trial, and a motion for new trial was granted with respect to Count Two.

With respect to the three counts upon which judgments of conviction were entered, Count One alleged that on or about April 9, 1973, the petitioner did knowingly cause to be delivered by mail an envelope from the Central District of California to one K. Wherry, Bx 2593, Orlando, Florida, which envelope allegedly contained obscene advertisements (A. 1). Count Four similarly charged that the petitioner, on or about May 11, 1973, caused a package to be delivered from the Central District of California to one P. Jamison, Bx 284, Lake Monroe, Florida, which package allegedly contained obscene advertisements (A. 2). Count Seven (A. 4) alleged that on or about May 18, 1973, the petitioner caused to be delivered by mail a package from the Central District of California to the same P. Jamison, Bx 284, Lake Monroe, Florida, allegedly containing obscene advertisements. All of the counts in the indictment charged mailings to the aforesaid two persons. K. Wherry was at all the aforesaid times Assistant United States Attorney for the Middle District of Florida, Orlando Division, and the mailing address for the United States Attorney's office was P.O. Box 2593, Orlando, Florida (A. 72). The name P. Jamison was a fictitious name employed by postal officials to correspond with petitioner and to pay for purchases made by the postal officials (A. 82-83; 91-93). The only alleged recipients of the material set forth in each of the nine counts of the indictment were the Assistant United States Attorney and the post office officials. No other recipients other than these officials testified at the trial.

2. Following the return of the indictment, the petitioner filed pretrial motions. The motion to dismiss the indictment (A. 6-8) alleged essentially that the indictment, and each and every count thereof, failed to state facts sufficient to constitute an offense against the United States; failed to state facts sufficient to constitute an offense because the grand jury which

[1]The reference "A" is to the Appendix in the Court of Appeals.

returned the indictment had been instructed to measure the alleged obscenity of the material named in the indictment by the standards first announced in *Miller v. California,* 413 U.S. 15 (June 21, 1973), and *Hamling v. United States,* 418 U.S. 87 (June 24, 1974), notwithstanding the fact that all the conduct alleged in the indictment occurred prior to the *Miller* decision and was therefore governed by the *Roth-Memoirs* standards; that the counts of the indictment charging the mailing of advertisements failed to state facts sufficient to constitute an offense under 18 U.S.C. §1461 because said mailings were governed exclusively by 18 U.S.C. §§1735 and 1737, as well as 39 U.S.C. §§3010 and 3011; that the material was not obscene but was entitled to constitutional protection; that the statute as construed and applied by the indictment authorized unrestrained and unlimited forum-picking by federal prosecutors and multivenue prosecutions under unascertainable standards, in violation of specified constitutional provisions; that the statute as construed and applied to conduct occurring prior to June 21, 1973, violated the due process and fair notice provisions of the Constitution; and that the indictment failed to inform the petitioner of the nature and cause of the accusation against him in violation of the pertinent provisions of the United States Constitution. The motion to dismiss the indictment was denied.

The petitioner also moved for inspection of the grand jury minutes or, alternatively, for particulars as to what standards and criteria of obscenity were presented to the grand jury (A. 9-10). In support of the said motion, an affidavit was submitted by

Stanley Fleishman, an attorney, stating that he met with one Robert D. Keefe, an attorney in the Department of Justice, and a Postal Inspector Lotz on August 19, 1974. At that time, the Justice attorney, Mr. Keefe, stated that he had presented the case to the grand jury and that there were no grand jury minutes available. Mr. Keefe was asked what criteria or standards of obscenity were given to the grand jury. He replied that portions of the opinion in *Miller v. California* and *Hamling v. United States* were read to the grand jury (A. 11-12). In opposing the aforesaid motion for inspection of grand jury minutes, no denial of the allegations made by Stanley Fleishman were made by the government. In opposing the motion to dismiss the indictment, the government maintained that the government attorney who had presented the case to the grand jury had acted in good faith in setting forth the standards enunciated in *Miller v. California* and *Hamling v. United States.* While denying the motions to dismiss the indictment and for inspection of the grand jury minutes, or for particulars as to what standards and criteria were presented to the grand jury, the district judge nevertheless assumed on the undisputed record that the only standards given to the grand jury were those enunciated in *Miller* and *Hamling* (A. 20-22).

There were additional pretrial motions, including motions for a bill of particulars (A. 23-27; 30), for discovery, inspection and production pursuant to Rule 16 (A. 31-48), and a motion for transfer of proceedings (A. 50-71). The motion for transfer was denied; the motions for a bill of particulars and for discovery were granted in part and denied in part.

3. The government's witnesses at the trial included, among others, Kendell Wherry, Assistant United States Attorney (A. 72); a postmaster (A. 82); and two postal inspectors (A. 93-94). The Assistant United States Attorney Wherry testified that on April 11, 1973, and June 4, 1973, he had received envelopes from Graduate Enterprises. Included within the inner envelopes were return envelopes and brochures. The inner envelopes contained in large black letters the words "Sexually Oriented" and the words "Please Note", with additional printing which contained the statement: "This envelope contains advertisements for adult material dealing with sex. If you are a minor or if you are not interested in adult material dealing with sex, please return this envelope and the envelope bearing your name and address so that we may remove your name from our files." (A. 72-76). The witness Wherry could not explain why the envelopes were sent to him at the United States Attorney's office instead of to his home where personal mail was usually addressed (A. 76-77). Although he had received other mailings on prior occasions, it was not until February 12, 1973, that he filled out a 3010 form for submission to the Post Office, and the witness did not know whether his name appeared thereafter on the government quarterly mailing list, although concededly a minimum of 30 days was required from the time of the completion of the form until the applicant's name was placed on a list (A. 78-79).[2]

[2]The government indicated in pretrial proceedings that it might press an issue of "pandering". The petitioner offered into evidence the form 3010 signed by the witness Wherry and the Post Office mailing list which indicated that Mr. Wherry's name was added on April 10, 1973 (A. 84-85). The petitioner urged that the evidence would show that the witness Wherry had actually solicited material prior to April 9, 1973, the day specified in the indictment, and that every effort had been made in good faith by petitioner to avoid sending any material to any person on the Post Office list. Whereupon the government withdrew for the record any contention with respect to "pandering", and the court refused to admit the exhibits offered by petitioner.

The postmaster, Robert Mann, testified that his address was Post Office Box 284, Lake Monroe, Florida (A. 82); that under the fictitious name of Philip Jamison he initiated purchases from Graduate Enterprises and that thereafter the mail he received from the said addressee was sent on to a postal inspector in Orlando, Florida. The postal inspector in Orlando proceeded to initiate a "test purchase procedure" (A. 91-93), and through the use of the fictitious name, Philip Jamison, ordered films and photos. Two postal inspectors (A. 93-94) interviewed the petitioner in California who allegedly characterized the materials he was advertising as educational (A. 94), and told the postal officers he made every effort to avoid sending material to those who were on the government's reference list and that he had employed a computer service to help match the reference list to his mailing list in order to remove any name that was on the government's list (A. 94).

The government called Michael Gutman (A. 95) and offered the witness as an expert on prurient interest and social value. The government witness testified that at one point in his clinical career as a psychiatrist, he had advised individuals to avail themselves of sexual material and had advised them to purchase explicit material and to see X-rated movies, movies that were definitely explicit (A. 96-97). The witness conceded that physicians and psychiatrists had told people to

look at explicit sexual films and sexual books in order to help them with various types of psychological problems (A. 100-101). The witness stated that sexual materials can be beneficial to people who have impotency problems (A. 101). The government witness was absolutely certain that explicit sexual material has some value and that the material involved in the case herein does have social value if used in the right and proper place (A. 102). Advertisements for such material, informing persons where the material could be obtained, would be of social value (A. 105). The witness agreed that openness about sex and being able to talk about sex is a good thing because breaking down guilt and shame values can be effective in promoting better mental health (A. 107). The witness agreed that if married couples were aided by explicit sexual material in opening lines of communication between themselves, it would be a pretty healthy thing (A. 108).

4. Following the testimony of the aforesaid government's expert witness, the government rested. Petitioner moved for a judgment of acquittal (A. 110). Since the case was allegedly being tried under the *Roth-Memoirs* standards, it appeared clear that the government had failed to prove an essential element of the offense where the government's own witness conceded that the material had social value. The district judge agreed that the government witness indicated that the material involved had social value, but concluded that since the government was not required to put on any expert testimony and could rely solely on the material itself, the motion for judgment of acquittal should be denied on that ground and all other grounds advanced by petitioner (A. 113-116).

Petitioner offered to prove, both on the issue of good faith and on the issue of community standards, that petitioner had made special efforts to make sure that his customer lists were purged, so that only those people who wanted to receive material would receive it. The petitioner offered to prove through a computer specialist that petitioner had employed the specialist to remove from a master list of mailing recipients the names which were either on the government's prohibitory list or who had indicated that they wished to be removed from the mailing list; that this had actually been accomplished by the computer expert; and that all the addressees of petitioner's material were derived directly from the printout of names given to petitioner by the computer. On the government's objection, all of the offered evidence, together with the expert witness, was rejected (A. 120-124; 127-129).

Since the trial judge indicated that the jury would be instructed to judge the material by the standards of the State of Florida and the Middle District, the petitioner requested the trial judge to take notice of the majority decision of a three-judge district court in *Meyer v. Austin*, 319 F.Supp. 457 (July 22, 1970), holding that the Florida obscenity statute was unconstitutional, and that said ruling enjoining the enforcement of the Florida obscenity statute was in effect at all times specified in the indictment herein.[3]

The petitioner called Arthur Knight, a professor in cinema at the University of Southern California and a writer with an extensive background as teacher,

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[3]See *Austin v. Meyer*, 408 U.S. 919; 413 U.S. 905.

writer and critic in the area of films (A. 126-127); Dr. Richard Green, a professor in the Department of Psychiatry and Behavioral Society at the State University of New York, with extensive background in psychiatry and human sexuality (A. 130); Mae Ziskin, holder of a Dr. of Philosophy degree in clinical psychology, an instructor at the Los Angeles City College, and a private practitioner in psychotherapy (A. 139); and Dr. Aaron Lippman, a Professor of Sociology at the University of Miami, where he had been employed for over twenty years (A. 141).

In one respect or another, the expert witnesses testified that the material here involved was not patently offensive, nor did the material affront contemporary community standards relating to sexual materials; that the material did not appeal to the prurient interest; and that the said material had redeeming social value.

5. After the denial of petitioner's renewed motion for judgment of acquittal (A. 142-143), the district judge held a Rule 30 hearing on proposed instructions. The government proposed an instruction to the effect that the materials could be measured by their appeal to the average adult or to deviants (A. 144-148). The petitioner, in objecting, argued that there had never been any charge or proof in the case that the materials were designed for a defined sexually deviant group. The government argued that there was no requirement to make such charge in the indictment or to present any proof to establish that the material was either designed for or appealed to the prurient interest of a deviant group. The trial judge indicated that he would give the instruction requested by the government (A. 144-148).

The petitioner requested the court to instruct the jury that if they found that the materials were mailed to adults who requested the materials, or were mailed placed in an inner envelope with a notice printed on the inner envelope stating that the contents were sexually oriented, then the jury could take such circumstances into account in deciding whether the materials were proven beyond a reasonable doubt to be patently offensive according to contemporary community standards. The request was denied (A. 149).

The district judge also declined to instruct the jury that in determining whether the materials were patently offensive according to contemporary community standards, the jury could take into consideration the fact that during the period alleged in the indictment, a federal court in the Middle District of Florida had declared the Florida obscenity statute unconstitutional and had enjoined the Attorney General of the State from enforcing that law (A. 150). The trial judge also declined the proposed instruction offered by the petitioner that if the jury found that the petitioner believed in good faith that the materials were not obscene because they possessed educational value, then the jury could acquit (A. 151).

The district court instructed the jury, among other things: "The materials here involved must be measured by its appeal to the average adult, applying contemporary community standards . . . In addition to considering the average or normal person, a prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group. An example of a group not sufficiently defined

would be one labeled as sexually immature. One clearly defined would be homosexuals." (A. 152-153). Petitioner objected to this instruction and to the refusal to give other instructions as requested by petitioner (A. 154).[4]

As heretofore stated, the jury returned guilty verdicts only with respect to Counts One, Two, Four and Seven of the indictment. All other counts involving films resulted in not guilty verdicts. The four counts upon which guilty verdicts were returned involved only brochures, and a motion for new trial was granted with respect to Count Two. Petitioner's motion for new trial in other respects was denied (A. 159-160). A motion in arrest of judgment was not considered by the district judge because deemed untimely (A. 161-164).

The sentence of the court as to each count upon which a verdict of guilty was returned was that petitioner be imprisoned for 18 months, 6 months of which were to be spent in confinement, the balance to be suspended, and petitioner to be put on probation for 3 years, the sentences of imprisonment to run concurrently. As to each count, a fine of $5,000 was imposed to run consecutively. The appeal to the Court of Appeals below followed.

[4]The jury retired for its deliberations, but subsequently inquired: "If one brochure is obscene, should the whole package be considered obscene?" (A. 154-157). The district judge instructed the jury that each and every piece of material as to a count under consideration was not required to be proved obscene, but that obscenity must be established as to at least one of the pieces of material contained in an envelope or package in a count under consideration (A. 157). In each of the three counts upon which petitioner was convicted, at least one of the brochures allegedly depicted deviant relations. *Cf., Stromberg v. California*, 283 U.S. 359, 370.

6. The opinion of the Court of Appeals, attached hereto as Appendix A, affirmed the judgment of conviction.

The opinion of the Court of Appeals concedes that an instruction to a petit jury according to *Miller*, when the acts forming the basis of the suit took place when the *Roth-Memoirs* definition of obscenity prevailed, would constitute an *ex post facto* violation. The Court, however, declined to apply the same rule when a prosecutor misstates the law in the same respects to a grand jury. Without reference to the effect of the provisions of the Fifth and Sixth Amendments, the Court of Appeals held that, "The rules governing the operation of a grand jury are much less formal than the rules governing the operation of a trial court."

With respect to the testimony of the sole government witness that the material concededly had social value, the Court of Appeals stated that such testimony could be disregarded, since expert testimony was "not necessary to enable the jury to judge the obscenity of material". The Court of Appeals agreed with the trial judge that the jury was entitled to disregard all the expert testimony on the issue of social value, even if both the government witness and the petitioner's expert witnesses agreed that the material had some value.

The Court of Appeals held that the petitioner was not deprived of his liberty without due process of law when the trial court instructed the jury that the brochures could be measured solely by their appeal to the prurient interest of sexually deviant groups, despite the fact that neither the indictment nor the evidence offered by the government at the trial charged or sought to establish any plan on the part of the petitioner for dissemination of the brochures to any deviant groups.

The Court of Appeals held that the petitioner had not been arbitrarily deprived of the right to present exculpatory evidence, and that it was proper for the district court to refuse to instruct the jury that the Florida obscenity statute had been declared unconstitutional.

The court below held that the statute, as construed and applied to authorize forum-shopping and selective enforcement by federal prosecutors, as argued by petitioner, was free from constitutional infirmity even in its application to the petitioner herein.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The federal question has been decided in a way in conflict with applicable decisions of this Court.

The appellate court recognized, as did the trial judge, that the record established unmistakably that the prosecutor instructed the grand jury to measure the probable obscenity of the brochures and petitioner's guilt solely by the standards enunciated by this Court in *Miller v. California*, 413 U.S. 15, decided June 21, 1973. The petitioner's alleged criminal conduct occurred before *Miller* was decided, when the governing standards were those enunciated in *Roth-Memoirs*.

The Court of Appeals conceded that had a petit jury been instructed solely on the basis of the *Miller* standards, where the conduct involved occurred prior to *Miller*, a judgment of conviction rendered thereunder could not be upheld. It is beyond controversy that the *Miller* standards expanded the field of potential criminal liability and the the test for obscenity was explicitly adopted to ease the prosecutor's burden. The *Miller* standards substantially changed the law of obscenity and made it easier to convict the accused. In both *Miller* (413 U.S. at 22-25) and *Hamling* (94 S.Ct. at 2907), this Court recognized that *Miller* permitted the imposition of a lesser burden on the prosecution in proving the elements of obscenity.

Thus, a number of courts have held that where a defendant is accused of engaging in alleged unlawful conduct prior to *Miller*, due process fairness bars the

retroactive judgment of his conduct using the expanded *Miller* definition, since such an accused plainly lacked notice of the subsequent expansion of the statute. Prior to *Miller,* a distributor could determine that he was protected as long as the material was not utterly without redeeming social value. The courts have been uniform in holding that to prosecute an accused under the judicially devised *Miller* definition of obscenity, and to instruct the jury on such definition, would be the formal equivalent of an *ex post facto* application of the law and would deprive an accused of due process by denying him fair warning that his acts, when committed, constituted a crime. See, *United States v. Jacobs,* 513 F.2d 564 (9 Cir. 1974); *United States v. Wasserman,* 504 F.2d 1012 (5 Cir. 1974). See also, *United States v. Henson,* 513 F.2d 156 (9 Cir. 1975). In *Bouie v. City of Columbia,* 378 U.S. 347, this Court held that an accused is deprived of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime when there is "an unforeseeable and retroactive judicial expansion" of statutory language. 378 U.S. at 352.

It is fundamental that an indictment found by a grand jury is indispensable to the power of a district court to try an accused for the crime with which he is charged. *Ex Parte Bain,* 121 U.S. 1; *Stirone v. United States,* 361 U.S. 212; *Russell v. United States,* 369 U.S. 749; *United States v. Denmon,* 483 F.2d 1093 (8 Cir. 1973). Indictment by a grand jury is the indispensable precondition to the trial of any person on a serious criminal charge. The Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime,

"unless on a presentment or indictment of a grand jury". A vital aspect of the Fifth Amendment is the grand jury's historic role as a barrier between arbitrary prosecutors and citizens who might suffer the stigma of public trial for serious crime. The purpose of the grand jury is to receive evidence of innocence as well as of guilt. *Wood v. Georgia,* 371 U.S. 375. A presentation by a prosecutor to a grand jury which misstates the law and the standards for judging probable guilt warps the judgment of the grand jury and its consideration of the evidence before it. As this Court recently stated in *United States v. Dionisio,* 410 U.S. 1, 16-17, "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge' . . . whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."

In the case herein, the prosecutor instructed the grand jury that they could find probable guilt solely under a standard which described the material as "lacking any serious literary, artistic, political or scientific value". The grand jury was not instructed that probable guilt could not be found unless the grand jury determined that the material was "utterly without redeeming social value or importance." No court can know whether or not the grand jury in this case would have returned the indictment if the grand jury had been properly instructed with respect to the applicable governing law. Both the grand jury and due process provisions of the Fifth Amendment have been violated in this case.

The petitioner was compelled to stand trial in violation of these constitutional provisions on an indictment which the government knew had been based on fundamentally incorrect statements of the law, statements which omitted mention of governing standards more protective of petitioner's rights. Under the decisions of this Court, the trial court was without jurisdiction to proceed, and the subsequent proceedings under the indictment could not undo the constitutional infirmities existing in the grand jury proceedings. See, *Alexander v. Louisiana,* 405 U.S. 625.

2. All of the witnesses produced in the case, both by the government and by the petitioner, agreed that the material involved was not utterly without redeeming social value. The expert witness offered by the government conceded again and again, both on direct and cross, that the material involved had some social value (A. 95-108). The witnesses for the petitioner were equally clear that the material upon which the verdicts of guilty were returned had social value and importance. The district judge who heard the testimony of the government's expert witness conceded that the government witness indicated that the advertisements had social value. Indeed, the district judge observed on the motion for judgment of acquittal that, "If the Government had a responsibility to probe an expert on this subject in order to sustain its burden, I think it would be clear at this point they hadn't" (A. 113-114). The district judge held, however, and the Court of Appeals agreed, that since the government did not have to put on any expert, it followed that the case could go to the jury, with the jury free to disregard the opinion of the government expert witness, as well

as petitioner's witnesses. Thus, while the case was tried under the *Roth-Memoirs* standards, the undisputed evidence which established that the *Roth-Memoirs* standards were not offended were disregarded. The jury was permitted to conclusively presume that the material was utterly without redeeming social value, although the government's evidence as well as petitioner's evidence established the contrary. For the government to offer evidence in an obscenity prosecution which demonstrates that the material involved is not utterly without redeeming social value, thus failing to establish the guilt of the petitioner, and then to disregard such government testimony in order to permit a judgment of conviction to stand, is contrary to the first principles of due process. See, *In re Winship,* 397 U.S. 358; *Cool v. United States,* 409 U.S. 100; *Vlandis v. Kline,* 412 U.S. 441; *Thompson v. Louisville,* 362 U.S. 199.

Whatever may be the rule with respect to the necessity on the part of the prosecution to prove by expert eivdence that material is "utterly without redeeming social value and importance", the fact is that the government in this case undertook the burden of proving the element of the offense by a witness, and that witness offered by the government refuted the very contention made by the government. Where testimony has been offered by the prosecution which establishes the innocence of an accused, it is a violation of basic due process, it is submitted, to disregard such sworn testimony on the theory that the testimony was unnecessary in the first place. The question presented below was not whether the government is required to prove an element of the offense by an expert witness. The

real question presented was whether testimony out of the mouth of a witness offered by the government, which establishes that material allegedly obscene under *Roth-Memoirs* actually has some social value, can be disregarded.

3. The instruction by the trial judge to the jury that the material could be measured solely by its appeal to the prurient interest of sexually deviant groups rendered the verdict and judgment of conviction unconstitutional.

This is not a case where the trial judge ultimately left only one issue to the jury, to wit, whether or not the material appealed to the prurient interest of the average person. This is a case where the trial judge specifically instructed the jury that the materials could be measured by their appeal to the average adult, or the prurient appeal requirement could be assessed "in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group . . . one clearly defined would be homosexuals" (A. 152-153). Moreover, there can be no dispute that the grand jury never received any evidence with respect to the appeal of the material to a sexually deviant group; that the indictment never made such a charge; and that the proof offered by the government supported no such charge. See, *Rabe v. Washington*, 405 U.S. 313; *DeJonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196; *Thompson v. Louisville*, 362 U.S. 199.

It was only when the trial had been completed and proposed instructions were under discussion that the trial judge for the first time indicated that the jury would be permitted to predicate guilt solely upon

appeal to the prurient interest of a sexually deviant group. Since each of the counts upon which petitioner was convicted involved brochures, some of which allegedly depicted deviant relations, it is possible that the jury's verdict of guilt resulted from the trial judge's alternative instruction on prurient interest appeal to a sexually deviant group. See, *Stromberg v. California*, 283 U.S. 359, 370.

In *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965), the Court of Appeals for the Second Circuit held that expert evidence was necessarily required when it was sought to establish that the material appealed to the prurient interest of a deviant segment of society. "The issue of what stirs the lust of the sexual deviant requires evidence of special competence." (350 F.2d at 166). In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, n.6, this Court reserved judgment "on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest", citing *Mishkin v. New York*, 383 U.S. 502, and *Klaw, supra*.

Moreover, both the *Miller* quintet of decisions and *Hamling* recognized that an accused in a federal obscenity prosecution has an admitted constitutional right to present evidence in his favor. *Kaplan v. California*, 413 U.S. 115; *Hamling v. United States*, 418 U.S. 87. Here, the petitioner and his counsel were never apprised until the trial was over that the jury would be instructed to judge the material by its appeal to a sexually deviant group. Had the petitioner been so apprised, the expert witnesses were available and could

have testified that the material did not appeal to a sexually deviant group, nor could it any longer be held that homosexuals were necessarily a clearly defined sexually deviant group in the light of new findings by knowledgeable experts in the area. The petitioner was also deprived of the opportunity to establish by evidence that the material was not designed for or disseminated to or directed to a particularly defined deviant group; that the material was intended solely for the average adult who requested and desired such material. See, *Chambers v. Mississippi*, 410 U.S. 284.

The opinion of the Court of Appeals ignores the constitutional questions presented and merely asserts that, "After reviewing the district court's instructions, we are of the opinion that appellant was adequately apprised of the nature of the offense with which he was charged." The Sixth Amendment, however, does not permit a judgment of conviction to stand which is based upon instructions to a jury after the trial of a case has been closed, where neither the indictment nor the proof at the trial charged or established the commission of a particular offense. See, *United States v. Denmon*, 483 F.2d 1093 (8 Cir. 1973).

4. The issues presented at this point involve the claim that the rulings and instructions of the district court arbitrarily deprived the petitioner of the right to present exculpatory evidence. The opinion of the Court of Appeals merely affirms that the evidence submitted by the prosecution was "sufficient to satisfy the *scienter* requirement of §1461". But the issue on this aspect of the case was not whether the government met its burden of proof, but whether the petitioner was deprived of the right to present evidence which

would establish his innocence, his lack of intent to do those acts which bring an accused within the purview of the law. This Court, in both *Kaplan v. California*, 413 U.S. 115, 121, and *Hamling v. United States*, 418 U.S. 87, emphasized that while it was relieving the prosecutor of the burdens of proof required in *Roth-Memoirs*, still it would always be open to the defendant in any federal obscenity prosecution to present evidence of his innocence.

The petitioner sought to establish that the only government witnesses who testified against him had solicited the material which they received, and that the petitioner had employed experts in the computer area to aid him in making certain that his list of customers did not include anyone who did not wish to receive the material. The petitioner offered this evidence not only with respect to his good faith, but also as supporting his theory that the local and state community standards were not offended when material was sent only to recipients who sought the material. The jury, however, was instructed that it was immaterial whether or not the brochures were solicited by the government officials, and the computer expert was not permitted to testify with respect to the efforts made by the petitioner to comply with all applicable provisions of the law with respect to the mailing of his brochures.

The congressional intent in enacting the provisions of 39 U.S.C. §§3010 and 3011, and the interpretive decisions of the courts, make it clear that the purpose of these laws was to permit each householder to make his own decision as to whether or not he desires to receive sexually oriented advertisements. Congress

could not have intended, at one and the same time, to permit the mailing of any type of advertisement to a citizen, with the right of the citizen to make a free determination of whether or not he wanted to receive such advertisements in the future, and yet impose criminal sanctions upon the mailer, even if he made every good faith effort to comply with the law. In the case of advertisements, Congress specifically has permitted the mailing of advertisements through the mails to those who request such material and who are willing recipients. Plainly, it was at least open to the petitioner here to present evidence, and have the jury consider, the petitioner's good faith efforts to avoid using the mails for any unlawful purpose. See, *Specht v. Patterson*, 386 U.S. 605; *Wolff v. McDonnell*, 94 S.Ct. 2963.

The trial court declined to instruct the jury that they could take into consideration, in determining whether the materials were patently offensive according to contemporary community standards, the fact that during the period of time in which the petitioner was charged with mailing the brochures into the Middle District of Florida, a federal court in the same district had declared the Florida obscenity statute unconstitutional and enjoined state officials from enforcing the law. If a jury is specifically told that the relevant community standard is the State of Florida, then, it is submitted, the petitioner was entitled to have the jury enlightened with respect to the fact that at the very time the brochures were mailed to Florida, the state law had been declared unconstitutional. This was not only relevant on the issue of community standards, but it was relevant on the issue of good

faith and intent and due process notice under the Constitution, since clearly the petitioner was entitled to believe that the brochures could lawfully be mailed into the state in light of the then existing ruling of the federal court in the Middle District of Florida. It appears arbitrary and a violation of due process of law, it is submitted, to permit a prosecutor to merely present the brochure to a jury without any other evidence, leaving it to the jury to decide for themselves whether the brochures offended the community standards of the entire State of Florida, while denying the petitioner the right to inform the jury that the governing obscenity law in Florida had been held unconstitutional and unenforceable.

5. The petitioner here raises the invalidity of 18 U.S.C. §1461, on its face. The issue was raised in *Hamling*, but the majority in that case declined to deal with the issue on these terms: "Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the previous limiting construction of 18 U.S.C. §1461, these petitioners have none." (94 S.Ct. at 2906). The case here is different. Both the government and petitioner's witnesses agreed that the brochures here had some social value, and it is the contention of the petitioner that the material is, therefore, not obscene and is entitled to constitutional protection. The petitioner, it is submitted, had the standing on the record in the case to raise the issue of the unconstitutionality of the statute on its face. It is manifest that at the time the alleged conduct of petitioner occurred, the *Miller* and *Hamling* standards were not met. Nothing in the Court's decisions prior to *Miller* indicated any

authoritative construction which specifically defined the sexual conduct whose portrayal was barred by statute. Thus, the federal statute at that time specified in the indictment was vague, ambiguous, uncertain and overbroad, and violated the free speech and press and due process provisions of the fundamental law.

The indictment here involves only two recipients, a postal inspector and an Assistant United States Attorney. There is not an iota of evidence in the record to indicate that there was a single citizen in the Middle District of Florida who ever complained about receiving a brochure or advertisement from the petitioner. Assumedly, if the government had such complainants, it would have produced them. There can be no dispute, as well, that the government knew that the petitioner distributed his material nationally. When petitioner made a detailed and substantial request for transfer of proceedings pursuant to Federal Rules of Criminal Procedure, Rule 21(b), the motion was denied. In the First Amendment area, statutes which authorize unrestrained multivenue prosecutions at the whim of federal prosecutors can only result in abridgment of the exercise of freedoms of speech and press and the arbitrary and capricious deprivation of liberties without due process of law. The obvious forum-shopping and selective enforcement which took place in the case herein, and the denial of petitioner's right, in the interest of justice, to at least be tried in the locality in which he resided and did business, renders the statute, as so construed and applied, unconstitutional. The statute has been construed by the government officials in such a vague, ambiguous and overbroad manner as to authorize arbitrary application of criminal sanctions in an area of protected freedoms.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By STANLEY FLEISHMAN,
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APPENDIX A.

Judgment and Opinion of Court of Appeals.

United States of America, Plaintiff-Appellee, v. Hyman C. Slepicoff, d/b/a Graduate Enterprises, Defendant-Appellant. No. 75-1404. United States Court of Appeals, Fifth Circuit. Dec. 19, 1975.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, THORNBERRY and COLEMAN, Circuit Judges.

THORNBERRY, Circuit Judge:

It has long been established that obscenity is not within the ambit of the constitutional guarantees of freedom of speech and of the press. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *Jacobellis v. State of Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

After a jury trial, appellant was convicted on three counts of a nine count indictment charging violations of the federal statute prohibiting mailing of obscene material, 18 U.S.C. § 1461.[1] Appellant is charged

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[1] "Mailing obscene or crime-inciting matter."

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;"

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered

(This footnote is continued on next page)

with mailing obscene advertising brochures into the Middle District of Florida.

Five points of error are raised in this appeal, none of which warrants reversal of the district court's decision.

I.

Appellant's allegedly criminal conduct occurred during April and May of 1973. At this time, the constitutional standards for the regulation of obscenity were those set forth by the Supreme Court in *Roth v. United States, supra,* and *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). The standards which are currently applicable were established by the Supreme Court in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The decision in *Miller* was not handed down until June 21, 1973, subsequent to the conduct which is involved in this case.

Appellant contends that since the acts in question occurred before the Supreme Court's decision in *Miller,* it was improper for the prosecutor to instruct the grand jury to measure the obscenity of the material in question by the standards enunciated in *Miller,* and that the indictment was void under the rationale of *United States v. Wasserman,* 504 F.2d 1012 (5 Cir. 1974). In *Wasserman,* the conviction by the district

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by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulating or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

court under 18 U.S.C. § 1461 was reversed because the jury was instructed according to *Miller,* while the acts forming the basis of the suit took place where the older *Roth-Memoirs* definition of obscenity prevailed. The court in *Wasserman* held that the ex post facto effect of applying *Miller* to actions occurring before the decision was handed down justified reversal of the district court's decision. Appellant believes that the case at hand presents an analogous situation. We disagree.

The rules governing the operation of a grand jury are much less formal than the rules governing the operation of a trial court. A grand jury need not be convinced beyond a reasonable doubt that a defendant is guilty; if an indictment is valid on its face, it is enough to call for a trial of the charge on the merits. *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). In *Hamling v. United States,* 418 U.S. 87; 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), the Supreme Court stated that "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Supra,* 94 S.Ct. at 2907. The Supreme Court in *Hamling* went on to conclude that the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency. *Supra,* at 2908. Therefore, the mere tracing of the words of 18 U.S.C. § 1461 in the indictment was sufficient to apprise appellant of the charges against him.

II.

Appellant's second contention is that the prosecution failed to prove beyond a reasonable doubt that the brochures in question were utterly without redeeming social value. It is true that the majority of the expert testimony presented was favorable to appellant, and that the testimony of government witness Michael Gutman was somewhat inconsistent; however, "[e]xpert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence." *Hamling v. United States,* 94 S.Ct. at 2899. Since the allegedly obscene material was offered in evidence, the jury was entitled to reject all of the expert testimony offered by appellant and to conclude that the brochure in question was obscene.

III.

In essence, appellant's third argument is that the instruction by the trial judge to the jury that the brochures could be measured solely by their appeal to the prurient interest of sexually deviant groups, where neither the indictment nor the proof established any plan or dissemination of the brochures to such deviant groups, deprived appellant of due process of law because it did not sufficiently apprise him of the nature of the charges against him.

After reviewing the district court's instructions, we are of the opinion that appellant was adequately apprised of the nature of the offense with which he was charged. "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused

of the specific offense, coming under the general description, with which he is charged." *Hamling v. United States, supra,* 94 S.Ct. at 2907, citing *United States v. Hess,* 124 U.S. 483, 487, 8 S.Ct. 571, 573, 31 L.Ed. 516 (1888). The indictment in question traced the language of 18 U.S.C. § 1461, and also set forth the specific acts which allegedly constituted violations of this statute.

IV.

Appellant's fourth contention is that the rulings and instructions of the district court arbitrarily deprived him of the right to present exculpatory evidence.

First, appellant introduced evidence that the brochures were only distributed to consenting adults and that a good faith effort was made to comply with 39 U.S.C. §§ 3010 and 3011.[2] Such evidence was not relevant to a charge under § 1461. Appellant was charged with mailing "obscene" material, not "sexually oriented" material. In fact, § 3011 expressly states that § 3010 does not amend, preempt, limit, or modify § 1461 in any way. 39 U.S.C. § 3011. Therefore, the district court's exclusion of this evidence was proper.

Nor is appellant's contention that such evidence is relevant to intent plausible.[3] According to the Supreme

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[2]These sections of Title 39 deal with the distribution of "sexually oriented" advertisements to children and nonconsenting adults.

[3]In essence, appellant argues that since he made a good faith effort to comply with the provisions of 39 U.S.C. § 3010; the prosecution failed to make a sufficient showing of criminal intent. In *Hamling v. United States, supra,* 94 S.Ct. at 2910, 2911, the Supreme Court held that a showing by the prosecution that the defendant had knowledge of the contents and character of the allegedly obscene materials was sufficient to satisfy the scienter requirement of 18 U.S.C. § 1461.

Court's opinion in *Hamling*, "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Supra*, 94 S.Ct. at 2910.

The evidence submitted by the prosecution which tended to show that appellant knew the contents and character of the materials in question was sufficient to satisfy the scienter requirement of § 1461.

Appellant also argues that the district court erred when it declined to instruct the jury that during the period of time in which the appellant was charged with mailing the brochures into the Middle District of Florida, a federal court declared the Florida obscenity statute unconstitutional. Appellant feels that it was relevant to a determination of whether the material in question was patently offensive according to contemporary community standards. A similar question was raised in *United States v. Hill*, 500 F.2d 733, 739 (5 Cir. 1974), where we held that "[t]he community standard is not necessarily gauged by the state law, and the fact that a three-judge federal court in *Meyer v. Austin*, 319 F.Supp. 457 (M.D.Fla. 1970), app. dismissed, 413 U.S. 902, 93 S.Ct. 3029, 37 L.Ed.2d 1018 (1973), declared Florida Statutes § 847.011

(1967) unconstitutional was not relevant to this federal obscenity prosecution." We feel that the argument made by appellant in the case at hand is essentially the same, and that it was proper for the district court to refuse to instruct the jury that the Florida obscenity statute had been declared unconstitutional.

Likewise, the district court's instruction to the jury that they could disregard the testimony of the expert witnesses was proper.[4] *Hamling v. United States, supra*, 94 S.Ct. at 2899.

V.

Appellant's final contention is that 18 U.S.C. § 1461 is unconstitutional on its face and as applied to appellant.

The constitutionality of § 1461 has been upheld by the Supreme Court on several occasions. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957); *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971).

Appellant also feels that § 1461 is unconstitutional as applied because the multivenue provisions contained in 18 U.S.C. § 3237 allow forum shopping and selective enforcement by federal prosecutors. According to *Hamling v. United States, supra, Miller* standards, including the "contemporary community

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[4]"Expert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence." *Hamling v. United States, supra*, 94 S.Ct. at 2899.

standards" formulation, apply to federal legislation. *Supra,* 94 S.Ct. at 2902, *citing United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973). In view of the contemporary community standards requirement of *Miller* it is logical to try a defendant who is charged with a violation of § 1461 in the district to which he allegedly mailed obscene materials. Appellant's choice to do business throughout the nation limited his right to be tried in the locality where he lives and bases his operations.

The judgment of the United States District Court for the Middle District of Florida is affirmed.

Affirmed.

APPENDIX B.

Order Denying Rehearing and Rehearing En Banc.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

January 29, 1976

TO ALL COUNSEL OF RECORD

RE: No. 75-1404—U.S.A. v. Hyman C. Slepicoff, d/b/a Graduate Enterprises

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
by /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Robert Sarno
Mr. Robert Trout
Mr. B. Franklin Taylor, Jr.
Mr. Harold Damelin
Mr. Samuel Rosenwein

APPENDIX C.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law, . . ."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. The provisions of Title 18 U.S.C. §1461 are:

"—Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use

or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any

such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term 'indecent,' as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948, c. 645, § 1, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; Aug. 28, 1958, P. L. 85-796, § 1, 72 Stat. 962.)"

5. The provisions of Title 18 U.S.C. §1735 are:

"Whoever—

(1) willfully uses the mails for the mailing, carriage in the mails, or delivery of any sexually oriented advertisement in violation of section 3010 of title 39, or willfully violates any regulations of the Board of Governors issued under such section; or

(2) sells, leases, rents, lends, exchanges, or licenses the use of, or, except for the purpose expressly authorized by section 3010 of title 39, uses a mailing list maintained by the Board of Governors under such section; shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for any second or subsequent offense.

(b) For the purposes of this section, the term 'sexually oriented advertisement' shall have the same meaning as given it in section 3010(d) of title 39. (Aug. 12, 1970, P. L. 91-375, § 6(j)(37)(A), 84 Stat. 781.)"

6. The provisions of Title 18 U.S.C. §1737 are:

"(a) Whoever shall print, reproduce, or manufacture any sexually related mail matter, intending or knowing that such matter will be deposited for mailing or delivery by mail in violation of section 3008 or 3010 of title 39, or in violation of any regulation of the Postal Service issued under such section, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for any second or subsequent offense.

(b) As used in this section, the term 'sexually related mail matter' means any matter which is within the scope of section 3008(a) or 3010(d) of title 39. (Aug. 12, 1970, P. L. 91-375, § 6(j)(37)(A), 84 Stat. 781.)"

7. The provisions of Title 39 U.S.C. §3010 are:

"(a) Any person who mails or causes to be mailed any sexually oriented advertisement shall place on the envelope or cover thereof his name and address as the sender thereof and such mark or notice as the Postal Service may prescribe.

(b) Any person, on his own behalf or on the behalf of any of his children who has not attained the age of 19 years and who resides

with him or is under his care, custody, or supervision, may file with the Postal Service a statement, in such form and manner as the Postal Service may prescribe, that he desires to receive no sexually oriented advertisements through the mails. The Postal Service shall maintain and keep current, insofar as practicable, a list of the names and addresses of such persons and shall make the list (including portions thereof or changes therein) available to any person, upon such reasonable terms and conditions as it may prescribe, including the payment of such service charge as it determines to be necessary to defray the cost of compiling and maintaining the list and making it available as provided in this sentence. No person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than 30 days.

(c) No person shall sell, lease, lend, exchange, or license the use of, or, except for the purpose expressly authorized by this section, use any mailing list compiled in whole or in part from the list maintained by the Postal Service pursuant to this section.

(d) 'Sexually oriented advertisement' means any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing. Material otherwise within the definition of this subsection

shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole of a single catalog, book, periodical, or other work the remainder of which is not primarily devoted to sexual matters. Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 749."

8. The provisions of Title 39 U.S.C. §3011 are:

"(a) Whenever the Postal Service believes that any person is mailing or causing to be mailed any sexually oriented advertisement in violation of section 3010 of this title, it may request the Attorney General to commence a civil action against such person in a district court of the United States. Upon a finding by the court of a violation of that section, the court may issue an order including one or more of the following provisions as the court deems just under the circumstances:

(1) a direction to the defendant to refrain from mailing any sexually oriented advertisement to a specific addressee, to any group of addressees, or to all persons;

(2) a direction to any postmaster to whom sexually oriented advertisements originating with such defendant are tendered for transmission through the mails to refuse to accept such advertisements for mailing; or

(3) a direction to any postmaster at the office at which registered or certified letters or other letters or mail arrive, addressed to the defendant or his representative, to return the registered or certified letters or other letters or mail to the sender appropriately marked

as being in response to mail in violation of section 3010 of this title, after the defendant, or his representative, has been notified and given reasonable opportunity to examine such letters or mail and to obtain delivery of mail which is clearly not connected with activity alleged to be in violation of section 3010 of this title.

(b) The statement that remittances may be made to a person named in a sexually oriented advertisement is prima facie evidence that such named person is the principal, agent, or representative of the mailer for the receipt of remittances on his behalf. The court is not precluded from ascertaining the existence of the agency on the basis of any other evidence.

(c) In preparation for, or during the pendency of, a civil action under subsection (a) of this section, a district court of the United States, upon application therefor by the Attorney General and upon a showing of probable cause to believe the statute is being violated, may enter a temporary restraining order or preliminary injunction containing such terms as the court deems just, including, but not limited to, provisions enjoining the defendant from mailing any sexually oriented advertisement to any person or class of persons, directing any postmaster to refuse to accept such defendant's sexually oriented advertisements for mailing, and directing the detention of the defendant's incoming mail by any postmaster pending the conclusion of the judicial proceedings.

Any action taken by a court under this subsection does not affect or determine any fact at issue in any other proceeding under this section.

(d) A civil action under this section may be brought in the judicial district in which the defendant resides, or has his principal place of business, or in any judicial district in which any sexually oriented advertisement mailed in violation of section 3010 has been delivered by mail according to the direction thereon.

(e) Nothing in this section or in section 3010 shall be construed as amending, preempting, limiting, modifying, or otherwise in any way affecting section 1461 or 1463 of title 18 or section 3006, 3007, or 3008 of this title. Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 750."

No. 75-1226

In the Supreme Court of the United States

OCTOBER TERM, 1975

HYMAN C. SLEPICOFF, DBA GRADUATE ENTERPRISES,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 524 F.2d 1244.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 29, 1976. The petition for a writ of certiorari was filed on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because the grand jury may have measured petitioner's

conduct in light of the obscenity standards set forth in *Miller* v. *California,* 413 U.S. 15, although that conduct occurred prior to the decision in *Miller.*

2. Whether petitioner was entitled to an acquittal because the government's expert witness allegedly agreed that the materials at issue were not utterly without redeeming social value.

3. Whether the trial court erred in instructing the jury that it could consider the prurient appeal of the materials to sexually deviant groups.

4. Whether petitioner was entitled to introduce evidence of good faith in mailing the materials.

5. Whether the jury should have been instructed that the State of Florida's obscenity statute had been held unconstitutional prior to the time of petitioner's conduct.

6. Whether 18 U.S.C. 1461 is unconstitutional.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of mailing obscene advertisements, in violation of 18 U.S.C. 1461.[1] He was sentenced to concurrent terms of eighteen months' imprisonment, with twelve months of the sentence suspended, to be followed by three years' probation. Petitioner was also fined $5,000 on each count. The court of appeals affirmed (Pet. App. A).

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[1]The indictment contained nine counts charging petitioner with mailing obscene films, photographs and advertisements. One count was dismissed prior to trial, and petitioner was found not guilty on four counts. Petitioner's motion for a new trial was granted on one of the four remaining counts on which he had been found guilty.

The government's evidence showed that petitioner operated Graduate Enterprises in Canoga Park, California. In April 1973, he mailed unsolicited advertisements to Kendell Wherry, an Assistant United States Attorney, in Orlando, Florida (Tr. 30-33, 56). In May 1973, petitioner mailed advertisements addressed to Philip Jamison in Lake Monroe, Florida (Tr. 94-95). Jamison was the ficticious name used by a postal inspector who made test purchases from petitioner (Tr. 109-110).

The advertisements mailed by petitioner were introduced at trial. They depicted, *inter alia,* copulation, homosexual acts, masturbation, sodomy, fellatio, beastiality, masochism, and sadomasochism. Other subjects noted in the advertisements include pedophelia, erotic cannibalism, and necrosadism.

Dr. Michael Gutman, a psychiatrist, testified for the government that the materials appealed to prurient interests and were utterly without redeeming social value (Tr. 329-330). Experts who testified for petitioner contradicted these conclusions (Tr. 443-444, 516-518, 593, 603-604, 657).

The jury was instructed that the materials could be found obscene only if they were found (1) to appeal to a prurient interest under contemporary community standards, (2) to be patently offensive to contemporary community standards, and (3) to be utterly without redeeming social value (Tr. 932). The court further instructed the jury that the prurient appeal of the material was to be measured by its appeal to the average adult, but could also be assessed in terms of a clearly defined sexually deviant group, such as homosexuals (Tr. 934).

ARGUMENT

1. In a pretrial motion to dismiss the indictment, which was denied (M. Tr. 2-5),[2] petitioner claimed that

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[2]"M. Tr." refers to the transcript of the hearing on pretrial motions, including the motion at issue here.

the indictment was returned under the standard of *Miller* v. *California*, 413 U.S. 15. He bases that claim on an affidavit submitted by petitioner's counsel, in which counsel stated that he had learned from the prosecutor that portions of *Miller* and *Hamling* v. *United States*, 418 U.S. 87, had been read to the grand jury.[3] Petitioner contends (Pet. 17-20) that the indictment was invalid because the conduct for which he was indicted occurred prior to the decisions in either *Miller* or *Hamling*. As the court of appeals correctly held (Pet. App. 3), this claim is not meritorious.

Although the courts below assumed, *arguendo*, that the grand jury returned the indictment under *Miller* standards, that has not been established as a matter of fact. Petitioner's counsel states merely that portions of *Miller* and *Hamling* were read to the grand jury. It does not necessarily follow, however, that the grand jury considered only the *Miller* standards in returning the indictment. Such speculation is not a proper basis for invalidating the indictment.

In any event, the indictment is valid on its face and is not open to challenge on the ground petitioner raises. *Costello* v. *United States*, 350 U.S. 359, 361-364; *Lawn* v. *United States*, 355 U.S. 339, 349; *United States* v. *Calandra*, 414 U.S. 338, 345. In *Costello*, the Court determined that an indictment was valid even though supported entirely by hearsay. The Court held, citing *Holt* v. *United States*, 218 U.S. 245 (indictment supported in large part by incompetent evidence), that "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for trial of the charge on the merits" (350 U.S. at 363).

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[3]The portions of the grand jury proceedings pertinent to this point were not recorded.

Similarly, the indictment here is sufficient to call for a trial on the merits, in which petitioner's interests are safeguarded by a requirement of "strict observance of all the rules designed to bring about a fair verdict" (350 U.S. at 364). The indictment charged the offenses in the language of the statute and was otherwise specific as to time and place of the violations. At trial, the jury was instructed in conformity with *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413,[4] and petitioner was convicted under that standard. Under these circumstances, "[n]either justice nor the concept of a fair trial" (350 U.S. at 364) requires opening the indictment to challenges of the kind petitioner advances.[5]

2. Petitioner contends (Pet. 20-22) that his conviction is invalid because the government's expert witness allegedly agreed that the materials here were not utterly without redeeming social value. But the government's witness, Dr. Gutman, testified that the materials were utterly without redeeming social value (Tr. 329-330), and Dr. Gutman did not withdraw this opinion. Admittedly, Dr. Gutman denied that the materials had no value whatsoever, on the ground that such materials appeal to prurient interest

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[4]There is thus no reason to hold this case pending a decision in *Marks* v. *United States*, No. 75-708, certiorari granted March 1, 1976, which presents the question, *inter alia*, of whether the standards set forth in *Miller* may be applied at trial to pre-*Miller* conduct. As this Court's cases (cited above) suggest, the history and function of the grand jury distinguishes the issue in this case from the analogous issue raised in *Marks* in the context of trial.

[5]There is no basis for a claim that the grand jury was biased in this case. A claim of prosecutorial bad faith would be equally groundless. The cases cited by petitioner (Pet. 18), which bar the application at trial of *Miller* standards to pre-*Miller* conduct, were decided after the return of the indictment.

and therefore might aid temporarily in the treatment of impotency (Tr. 335-336). He observed, however, that in the long run use of the materials would be counterproductive and ineffectual (Tr. 336). Dr. Gutman concluded that the materials would be of little or no value, and in fact harmful, if used in an uncontrolled context (Tr. 353).

Under Dr. Gutman's theory, nothing could ever be obscene, since he views appeal to prurient interest as itself having social value. The materials were introduced at trial and are themselves a sufficient basis for the jury's verdict. As the Court has said on several occasions (*Hamling* v. *United States, supra,* 418 U.S. at 100; see *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56; *Ginzburg* v. *United States,* 383 U.S. 463, 465): "Expert testimony is not necessary to enable the jury to judge the obscenity of material which * * * has been placed into evidence."

3. Petitioner contends (Pet. 22-24) that the trial court erred in instructing the jury (Tr. 934) that prurient appeal may be assessed not only by average adult standards, but also by the standards of a clearly defined sexually deviant group. A similar instruction was approved in both *Hamling* v. *United States, supra,* 418 U.S. at 128-130, and *Mishkin* v. *New York,* 383 U.S. 502, 508-509. The trial judge was justified in this case in concluding that some of the materials dealt with sexual deviancy and that the instruction was therefore warranted.

Petitioner nevertheless argues that the instruction was unforeseeable, and that he could have offered expert testimony had he known that the instruction would be given. But *Mishkin* was decided more than eight years prior to petitioner's trial, and *Hamling,* six months before the trial. In view of the nature of the materials at issue, the instruction approved in those cases was foreseeable.

Petitioner also argues that before such an instruction was proper the government was required to introduce expert testimony showing appeal to the prurient interest of sexually deviant groups. Petitioner relies (Pet. 23) on *United States* v. *Klaw,* 350 F.2d 155 (C.A. 2), in which the court reasoned that without some expert evidence showing prurient appeal of the materials to the average person or to a particular group, the jury was impermissibly left to its own subjective judgment. But the Second Circuit subsequently held that the *Klaw* requirement does not apply where, as here, the materials are hard-core pornography, even though it is claimed that the material is targeted at a particular group. *United States* v. *Wild,* 422 F.2d 34, 35-36. In the present case, moreover, the trial court on two occasions explicitly admonished the jury not to apply its own subjective standards in considering the materials (Tr. 930, 937).

In *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56, n. 6, the Court reserved judgment on the need for expert testimony in a case in which the "contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge * * *." But with reference to the predominant themes of the material at issue here, a juror's experience is not so "plainly inadequate" as to overcome the fact that (*ibid.*):

> [Obscenity] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. * * * No such assistance is needed by jurors in obscenity cases; indeed, the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.

See *Hamling* v. *United States, supra,* 418 U.S. at 100; *Kaplan* v. *California,* 413 U.S. 115, 121.

4. Petitioner challenges (Pet. 24-26) certain evidentiary rulings of the trial court. He claims that he should have been allowed to submit evidence that he attempted in good faith to mail the materials to those who would not object to receiving them. Consent of the recipient is, however, irrelevant when the mailing is shown to be of obscene material, *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 68-69, and the good faith of petitioner's attempt to mail such material only to consenting recipients is likewise irrelevant under 18 U.S.C. 1461.

Petitioner also claims that he should have been allowed to present evidence concerning his good faith efforts to comply with 39 U.S.C. 3010 and 3011.[6] This claim is foreclosed by 39 U.S.C. 3011(e), which provides:

> Nothing in this section or in section 3010 shall be construed as amending, preempting, limiting, modifying, or otherwise in any way affecting section 1461 * * * of title 18 * * * .

Moreover, petitioner was convicted of mailing obscene material, rather than merely "sexually oriented advertisements," which is all that is treated in Sections 3010 and 3011. Petitioner's evidence of attempted compliance with those provisions is thus immaterial.

5. Petitioner also contends (Pet. 26-27) that the trial judge should have instructed the jury that the Florida obscenity statute had been held unconstitutional by a three-judge federal court prior to petitioner's mailings. See *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla.), appeal dismissed, 413 U.S. 902. Petitioner, of course,

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[6]Section 3010 provides, in general, for the protection of those who have indicated that they do not wish to receive sexually oriented advertisements. Section 3011 provides for judicial enforcement of Section 3010.

was neither charged nor convicted under Florida law. As the Fifth Circuit said in *United States* v. *Hill,* 500 F.2d 733, 739, certiorari denied, 420 U.S. 952, in rejecting the same claim, the fact that the state statute had been held unconstitutional is not relevant to the issue whether petitioner violated the federal statute, since the judicial invalidation of the State's obscenity statute shed no light upon contemporary community standards. See *United States* v. *Danley,* 523 F.2d 369 (C.A. 9), certiorari denied, February 23, 1976 (No. 75-566).

6. Petitioner finally contends that 18 U.S.C. 1461 is unconstitutional (Pet. 27). Petitioner's claim that the statute was unconstitutionally vague on its face prior to *Miller* v. *California, supra,* was rejected in *Hamling* v. *United States, supra,* 418 U.S. at 99; see *United States* v. *Reidel,* 402 U.S. 351, 353-354; *Roth* v. *United States, supra,* 354 U.S. at 492. Petitioner's claim that the statute is unconstitutional because it subjects him to multivenue prosecutions is likewise insubstantial. As the court of appeals pointed out (Pet. App. 8), "[petitioner's] choice to do business throughout the nation limited his right to be tried in the locality where he lives and bases his operations." See *Hamling* v. *United States, supra,* 418 U.S. at 106.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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